THE HLT GROUP LTD.

v.

HOLBORN LAW TUTORS SDN. BHD. & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-22-402-1992]
30 JUNE 1992

PRACTICE AND PROCEDURE: Ex-parte injunction - Application to set aside - Trust relationship - Whether there was a trust relationship between the plaintiff and the first defendant - Fiduciary duties - Whether fiduciary duties owed by second and third defendants - Breach - Whether there was a breach of the fiduciary duties - Non disclosure by plaintiff - Whether there was non disclosure - Whether of material facts - Section 122 Companies Act 1965 - Whether there was contravention - Granting of ex parte injunction - Effect - Statutory declaration and power of attorney - Effect

The plaintiff (Holborn UK) was incorporated in England in 1974 for the sole purpose of providing diverse education services through institutions of higher learning. In 1983, the first defendant (Holborn Malaysia) was incorporated to tap the potential of the education business in Malaysia. Only two shares were issued to the original subscribers. They were appointed the first directors. In 1985, the second defendant was appointed resident educational counsellor of the counselling centre set up by Holborn Malaysia which acted as agent for Holborn UK. In 1987, two board resolutions were passed, accepting the second and third defendant as directors, subsequently, a resolution was passed transfering the shares held by those directors to the second and third defendants. Hoborn Malaysia had two other directors one being the chairman of Holborn UK (Grenier) and the principal of Holborn College (Aggett). Day to day administration was however in the hands of the second and third defendants.

In late 1991, there were allegations that the second and third defendants were undermining the relationship between Holborn UK and Holborn Malaysia, and that the second defendant was treating Holborn Malaysia as if it were her own. The second and third defendants requisitioned for an extraordinary general meeting (EGM) to be held on 23 March 1992, to remove both Grenier and Aggett as directors of Holborn Malaysia. To prevent the EGM from taking place, Holborn UK obtained an *exparte* injunction restraining, *inter alia*, the second and third defendants from holding the EGM, from acting or holding themselves out as directors etc of Holborn Malaysia and from entering its premises. The defendants applied to have the ex-parte injunction set aside. The issues raised concerned the relationship between Holborn UK and Holborn Malaysia the non disclosure by the plaintiff of material facts and the contravention of s. 122 Companies Act 1965.

Holborn UK exhibited two documents to show that there was a trust relationship between Holborn UK and Holborn Malaysia namely a power of attorney dated 23 January 1988, granted by Holborn UK to the second defendant and the statutory declaration made by the second defendant on 8 June 1988, in which she stated that Holborn Malaysia was a subsidiary of Holborn UK. They pleaded 8 instances of breach by the second and third defendants of their fiduciary duties.

Regarding non disclosure the second and third defendants alleged that they had paid RM2 for the shares in Holborn Malaysia and though this was evidenced by the 1987 audited accounts of Holborn Malaysia, which were in the possession of Holborn UK, this was not disclosed by them at the time the *exparte* injunction was applied for.

Held:

[1] There was a trust relationship existing between Holborn UK and Holborn Malaysia, and the second and third defendants held their shares in Holborn Malaysia in trust for Holborn UK. The power of attorney which empowered the second defendant on behalf of Holborn Malaysia to safeguard Holborn UK's interests in Malaysia, and the statutory declaration made by the second defendant provided ample evidence to show that there was an element of such a trust relationship.

[2] The second and third defendants, either jointly or separately, had committed breaches of the fiduciary duties owed by them to Holborn UK.

[3] The non disclosure by Holborn UK of the 1987 accounts did not have much bearing on the decision to grant the injunction in the first

place. Even if there had been non disclosure, it was not of material facts, or it was of facts which could be tested only by oral evidence. The succuss of the non disclosure argument lies not in the non disclosure per se but in non disclosure of material facts.

[4] Section 122, Companies Act 1965, which made it mandatory for a Malaysian company to have 2 directors resident in Malaysia, was not in any way contravened by the granting of the injunction. The injunction was only a temporary measure suspending the second and third defendants from acting as directors of Holborn Malaysia, and until they were removed they were still directors of Holborn Malaysia.

[Application dismissed with costs.]

[**Editor's Note:** The defendants appealed to the Supreme Court vide Civil Appeal No. 02-234-92 and the Court (comprising Harun Hashim, Eusoff Chin and Edgar Joseph Jr. SCJJ) allowed the appeal on 3 September 1992.]

Legislation referred to:
Companies Act 1965, s. 122
Copyright Act 1987, s. 42

For the plaintiff - T. Thomas; M/s. Skrine & Co.
For the 2nd & 3rd defendants - N. Nagarajah (John Mathew with him); M/s. Shook Lin & Bok

JUDGMENT

Siti Norma Yaakob J:
The facts leading to this cause of action in this suit are set out in the following manner.

The plaintiff (Holborn U.K.) was incorporated in England in 1974 for the sole purpose of providing diverse education services through institutions of higher learning like the Holborn College, London, which specialises in law and business studies, with emphasis on degree and professional qualifications.

In the early 70's, a large majority of the students in Holborn College came from the United Kingdom itself but this trend changed dramatically in the 1980's when more foreign students enrolled at the college and this prompted Holborn U.K. to come to Malaysia to tap the potential of its education business.

To that end Holborn U.K. instructed a firm of solicitors, Messrs. Shearn Delamore & Co. in Kuala Lumpur to incorporate a company in Kuala Lumpur to perpetuate the Holborn name and to extend the company's business. It was under such circumstances that the 1st defendant (Holborn Malaysia) was incorporated on 11 July 1983, with an authorised capital of RM25,000 divided into 25,000 shares of RM1 each. However, only two shares were issued to the two original subscribers of Holborn Malaysia namely Rahmat Jamari (Rahmat) and Santha Menon (Menon), the partners of Shearn Delamore & Co. and Rahmat and Menon were also appointed the first directors of Holborn Malaysia. For the first 4 years of its establishment, Rahmat & Menon represented the interests of Holborn U.K. on the board of directors of Holborn Malaysia and they acted as trustees for Holborn U.K.

In 1985 Holborn U.K. decided to open a Counselling Centre in Kuala Lumpur and to appoint a Malaysian as a resident Educational Counsellor. The second defendant was appointed to that post on 10 May 1985 and she became Holborn Malaysia's first employee. With her appointment, Holborn Malaysia commenced its business of recruiting students from Malaysia to enrol for the various courses conducted by Holborn U.K. and in this respect, Holborn Malaysia acted as an agent for Holborn U.K.

On 2 May 1987, Holborn Malaysia, at its sixth board of directors' meeting passed two important resolutions,

(1) Appointing the second and third defendants as directors and
(2) Accepting the resignations of both Rahmat & Menon as the directors of the company.

On 29th June 1987, at the seventh board of directors' meeting of Holborn Malaysia, the second and third defendants, as the new directors of the company, passed a resolution transfering the shares held by Rahmat and Menon to themselves and they also resolved the immediate transfer of the registered office of Holborn Malaysia from the offices of Messrs. Shearn Delamore & Co. at 2, Benteng, Kuala Lumpur to 3rd floor, 117, Jalan Raja Abdullah, Kampong Baru, Kuala Lumpur. Thus as at 29 June 1987, the second defendant was a Director as well as an employee of Holborn Malaysia, whilst the second defendant was only a director of Holborn Malaysia.

Besides the second and third defendants, Holborn Malaysia has also two other directors

who are resident in England, one being the Chairman of Holborn U.K (Grenier) and the other the Principal of Holborn College (Aggett). However, all the day to day administration and all the other affairs of Holborn Malaysia were managed by the second and third defendants and this arrangement seems to have suited both Grenier and Aggett, for so long as they were informed of what was going on in Holborn Malaysia.

The first hint of trouble came in late 1991 when Grenier and Aggett started questioning the actions of the second and third defendants in Holborn Malaysia and there were allegations that the second and third defendants were undermining what Holborn U.K. maintains as the trust relationship existing between Holborn U.K. and Holborn Malaysia and that the second defendant was treating Holborn Malaysia as if it was her own company. Matters came to a head when the second and third defendants as the shareholders of Holborn Malaysia requisitioned for an Extraordinary General Meeting (EGM) to be held on 23 March 1992 to remove both Grenier and Aggett as the Directors of Holborn Malaysia. It was to prevent this EGM from taking place that Holborn U.K. had, on 6 March 1992, obtained an *ex-parte* injunction, restraining *inter alia,* the second and third defendants from holding the EGM, from acting or holding themselves out as Directors, agents or employees of Holborn Malaysia and from entering the premises of Holborn Malaysia until after the trial of this action.

In proceedings to have the *ex-parte* injunction set aside, the second and third defendants raised the following issues.

1. Whether there is any trust relationship between Holborn U.K. and Holborn Malaysia.
2. Non disclosure of material facts at the time the *ex-parte* injunction was obtained.
3. Contravention of s. 122 Companies Act 1965.

Throughout these proceedings, Holborn U.K. has taken the stand that apart from representing its interests in Holborn Malaysia, both the second and third defendants, as shareholders of Holborn Malaysia, hold the two shares on trust for Holborn U.K. Holborn U.K. has also maintained that although Holborn Malaysia is managed by the second and third defendants, it continues to control and direct the major activities of Holborn Malaysia and to that end, the second and third defendants owe fiduciary duties to it. It is in respect of breaches of these fiduciary duties, which triggered the dispute over the control and management of Holborn Malaysia between Holborn U.K. on one hand and the second and third defendants on the other. Holborn U.K. has pleaded eight instances of breaches of fiduciary duties committed by either both the second and third defendants jointly or by each of them individually and particulars of such breaches are as follows.

1 *Opening of The Bank Buruh Account*

It is not disputed that Holborn Malaysia has always maintained one bank account with Malayan Banking Bhd, with the second defendant and Grenier as signatories.

On 18 December l991, the bank confirmed that RM50,000 had been transferred from the account to Bank Buruh and the main complaint about the transfer is that it was done without a resolution of the full board of Holborn Malaysia and without the knowledge of Grenier and Aggett.

The second and third defendants' answer to this complaint is that the transfer was effected in good faith and for a legitimate purpose namely to be used as increased share capital for the Bachelor of Arts (Education) programme as required by the Ministry of Education and that there was a directors' resolution dated 9 November 1991 to that effect. In any event, the account was subsequently closed when the second defendant was advised that the mode of increasing the share capital by the transfer of the money was contrary to the Companies Act 1965.

The directors' resolution dated 9 November 1991, confirms Holborn U.K.'s allegation that the authority to open the Bank Buruh account was made without the authority of the full board of Holborn Malaysia and it is this high handed manner of both the second and third defendants which is the subject matter of the complaint and not the fact that the transfer was for a legitimate purpose or that the account was never actively operated. By disregarding Grenier and Aggett, the second and third defendants have clearly intended to exclude them from the activities of Holborn Malaysia and such action is definitely wrong.

2. *Allotment of shares*

Although Holborn Malaysia has an authorised capital of RM25,000, it continued to be a RM2 company until January 1992 when the second and third defendants decided to increase its capital by alloting 12,499 ordinary shares of RM1 each to each of them in compliance with the Ministry of Education's requirement as a condition for embarking on a new education programme. Quite apart from the second and third defendants' contention that the allotment was made for the legitimate purpose of extending the scope of Holborn Malaysia's activities, the fact that such an allotment was made without the knowledge and resolution of the full board of Holborn Malaysia is yet another instance of an attempt by the 2nd and 3rd defendants to exclude Grenier and Aggett from the activities of Holborn Malaysia. This I say is wrong.

3. *Requisition of the EGM*

Whilst it is the prerogative of the second and third defendants as the only shareholders of Holborn Malaysia to requisition the EGM, the purpose of the EGM is most relevant and it is the testimony of the dispute between the local and foreign directors to wrestle control of Holborn Malaysia. It was this proposed EGM that hastened the foreign directors to seek the injunction and at this stage of the proceedings, it only suffices for me to say that the injunction at least was sufficient to maintain the *status quo* namely that the second and third defendants were prevented from ousting both Grenier and Aggett as directors of Holborn Malaysia until the rights of the parties have been determined.

4. *Incorporation of JD Educational Services Sdn. Bhd.*

It is not disputed that the second and third defendants incorporated the above company on 24 February 1992, but their reason for doing so appears to be in retaliation to Holborn U.K.'s action in reducing the scope of Holborn Malaysia's agency with Holborn U.K. However, there is no denial that the activities of this new company run parallel with Holborm Malaysia that is, servicing students in Malaysia for the law degree and Bar Finals courses provided by a rival of Holborn U.K. and clearly the second and third defendants have placed themselves in a conflict of interest situation and this can hardly be said to be working for the interests of Holborn Malaysia.

5. *The Star Educational Fair*

Educational fairs are one of the methods adopted by Holborn U.K. to advertise its activities and one of such fairs was held in Kuala Lumpur in February 1992, organised through the Star Publications

The second defendant participated at the fair under the name of JD Educational Services Sdn. Bhd. and on behalf of three other institutions but not for Holborn Malaysia. Here again there is another instance of a conflict of interest situation but the second defendant justifies her actions by pleading that Holborn U.K. has no right to complain as it was bent on taking positive steps to frustrate or terminate the agency of Holborn Malaysia. There is no evidence indicating that Holborn U.K. intended to end its agency with Holborn Malaysia and it does not stand to reason either, particularly when Holborn Malaysia was incorporated for the sole purpose of extending Holborn U.K.'s activities in Malaysia.

6. *Participation in Cadmus Ltd.*

Cadmus Ltd. is a rival of Holborn U.K. in London and advertisements and brochures published by Cadmus show the second defendant's active participation in Cadmus through JD Educational Services Sdn. Bhd. Apart from the second defendant acting in conflict with the interests of Holborn Malaysia, the second defendant has also used Holborn Malaysia's address, telephone number and fax number through which JD Educational Services can be contacted. The second defendant has not attempted to deny her actions in this matter.

7. *Accounting Irregularities*

There is ample evidence to show that at least six invoices submitted by the second defendant to Holborn Malaysia for reimbursement for expenses incurred had been tempered with and the amounts altered to show a higher figure than was originally charged. Whilst denying that she had altered them, the fact remains that the second defendant had sought reimbursement for the altered invoices and only oral evidence can confirm who has been telling the truth in this matter. In this respect, Holborn U.K., together with Holborn Malaysia

have sued the second defendant and another in C.S. No. D1-22-531-92 alleging misappropriation of funds by the second defendant and seeking the refund of all monies which have been overpaid to her.

8. *Brickfields College*

The complaint here is that the third defendant had, through Brickfields College, falsely advertised that it had been approved to offer support courses for Holborn College. The circular that was directed to the students containing particulars of this support courses is not however signed by the third defendant and neither is there any evidence to show that he was responsible for the issue of the circular. To that end, this complaint is unfounded.

Having gone through some of the improper conduct of the second and third defendants in managing Holborn Malaysia in late 1991 and early 1992, I now come to consider whether there is any substance to Holborn U.K.'s contention that the second and third defendants hold the shares of Holborn Malaysia in trust for Holborn U.K. By so asserting, Holborn Malaysia is made to be a subsidiary of Holborn U.K.

It is not disputed that between 1983 - 87, the shares held by Rahmat and Menon were for the benefit of Holborn U.K. but that was as far as the trust relationship exists and it is the contention of the second and third defendants that when they took over the directorships from Rahmat & Menon and bought over their shares, they no longer hold such shares beneficially for Holborn U.K. This is clearly seen from the audited accounts of Holborn U.K. for 1987 which shows that no beneficial interest has been declared in favour of Holborn U.K. and neither are there any documents to support that the trust relationship continued after 1987.

In this respect, I do not consider that the second and third defendants are correct as there are two documents exhibited which say otherwise. The first is a statutory declaration made by the second defendant on 8 June 1988, for the purpose of s. 42 of the Copyright Act l987. In it, the second defendant has categorically stated that Holborn Malaysia is a subsidiary of Holborn U.K.

Replying to her admission, the second defendant now states that the court should not take cognisance of such an admission as the statutory declaration is for a specific purpose namely to be used in proceedings under the Copyright Act 1987. As it was to be made by the owner of the copyright or agent of such owner, she signed it on behalf of Holborn Malaysia, the agent of Holborn U.K.

It is true that the statutory declaration was for a specific purpose but the second defendant must be deemed to be telling the truth when she swore that Holborn Malaysia is a subsidiary of Holborn U.K. A statement to that effect is a statement of the status of Holborn Malaysia with Holborn U.K. and regardless of the purpose for which the statutory declaration is intended, that statement is good to counter any allegation of the relationship between the two companies.

Before the execution of the statutory declaration, there is also a power of attorney dated 22nd January 1988 granted by Holborn U.K. to the second defendant, empowering her on behalf of Holborn Malaysia to safeguard Holborn U.K.'s interests in Malaysia.

By these documents, there is ample evidence to show that there is an element of a trust relationship existing between Holborn U.K. and Holborn Malaysia and to that end, the second and third defendants as the shareholders and directors of Holborn Malaysia, owe fiduciary duties to Holborn U.K.

Objection was also raised by the second and third defendants that Holborn U.K. had failed to disclose material facts at the time the *ex-parte* injunction was applied for. One of such facts is the consideration given for the transfer of the subscriber shares from Rahmat and Menon to the second and third defendants. It is the second and third defendants' contention that they paid RM2 for the shares and this is evidenced by the 1987 audited accounts of Holborn Malaysia, which were in the possession of Holborn U.K., but which was not disclosed and for this very ground, the injunction should not be allowed to continue.

It is true that Holborn U.K. did not exhibit the 1987 audited accounts of Holborn Malaysia to its application for the injunction but the success of the non-disclosure argument in injunction matters lies not in the non-disclosure *per se* but in non-disclosure of material facts.

In this case, one of the sellers of the two shares, Rahmat, has, on behalf of the other seller, Menon, affirmed that the transfer of the shares was made without consideration. However, when dealing with the matter of "Directors", the 1987 accounts dated 27 November 1987, has used the word "bought" with regard to the two shares held by the second and third defendants.

Before the 1987 accounts, there is another earlier document which deals with the transfer of these shares and that document is the seventh board of directors meeting of Holborn Malaysia held on 29 June 1987. The Minutes of that meeting records the resolution on the transfer of the shares but there is no mention as to whether such transfers were with or without consideration. Only the second and third defendants were present at that meeting and they must be assumed to be responsible for the Minutes. The fact that no mention was made in the Minutes of any consideration for the transfer supports the sellers' evidence that the transfer was effected without any consideration.

However, the fact that the accounts contain the word "bought" can only be tested by oral evidence and for this the Accountant or person who prepared the accounts needs to be called to ascertain where he had found the evidence to show that the shares were bought rather than transferred without any consideration.

In any event, the non-disclosure of the 1987 accounts would not have much bearing on my decision to grant the injunction in the first place as in the light of the Minutes that I have referred to, the accounts could not stand on their own. I place the same considerations for a similar statement contained in an application by Holborn Malaysia for permission to conduct certain courses in Malaysia.

There was also a submission by the second and third defendants that the injunction has contravened s. 122 of the Companies Act 1965. That section makes it mandatory for a Malaysian company to have two directors resident in Malaysia. As the effect of the injunction is to exclude the only two local directors, the second and third defendants, from acting as directors of Holborn Malaysia, Holborn Malaysia will be left with no local directors to manage its affairs.

The injunction that I had granted is only a temporary measure to safeguard the interests of Holborn Malaysia by the suspension of the second and third defendants acting as directors of Holborn Malaysia. Section 122 does not state that an injunction cannot be taken against any local director. Until they are removed and in this case this can only happen if Holborn U.K. succeeds at the trial, the second and third defendants are still directors of Holborn Malaysia but for the time being, they cannot function as such. That I consider is the effect of the injunction and to that end, s. 122 has in no way been contravened by the injunction.

Taking this case in its totality, it cannot be denied that Holborn Malaysia could not be incorporated without Holborn U.K. and that the dispute now before me is nothing more than a wrestle between the two local and two foreign directors to have control and management of Holborn Malaysia.

Under these circumstances, what is of uppermost importance at this stage of the proceedings is that the interests of Holborn Malaysia should be protected at all costs and bearing in mind that there are several issues to be tried particularly as regards the relationship of the parties to each other, the interests of justice is better served with the control and management being left to the foreign directors and on that finding, I had dismissed the second and third defendants' application with costs.